JUN 14 1974
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1876

WILLIE BREWINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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WILLIE BREWINGTON,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Willie Brewington prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction, after trial by jury, for possession with intent to distribute of controlled substances.

DECISION BELOW

The decision below, rendered without opinion, is reported at 486 F.2d 1396 (Table). No opinion

accompanied the judgment of the District Court for the Southern District of New York.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1973. No petition for rehearing was filed. Jurisdiction to review the decision of the Court of Appeals is conferred upon this Court by 28 U.S.C. §1254(1). Petitioner, acting pro se, filed a petition for a writ of certiorari by mailing it to the Clerk of this Court about December 15, 1973, in compliance with Supreme Court Rule 22(2). That petition was returned to him on January 5, 1974, for want of a certified copy of the decision below. Shortly thereafter, petitioner again mailed the petition, with the certified copy of the decision below to the Clerk of this Court. Thereafter, he heard nothing further from the Court, and did not learn that the Clerk's office had not received the returned petition until May 1, 1974, when so advised by present counsel, who was subsequently retained to prosecute this appeal on May 22, 1974. Petitioner was, at all times since July of 1973 incarcerated in the Federal penitentiary in Atlanta, Georgia. In these circumstances, petitioner asserts that the mailing of a petition on December 15, 1973, constituted timely filing in compliance with Supreme Court Rule 22(2).

QUESTION PRESENTED

Whether controlled substances seized during a search of the basement under petitioner's apartment, and additional controlled substances seized during execution

of a subsequently obtained but tainted search warrant, were seized in violation of petitioner's Fourth Amendment rights when Federal agents had peacefully arrested and manacled petitioner at his front door before commencing a 'security' search of the apartment and basement.

STATUTES INVOLVED

Petitioner relies upon the Fourth Amendment to the United States Constitution, which is:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The statutes under which petitioner was convicted – 21 U.S.C. §§812 (classification of controlled substances), 841(a)(1) (possession with intent to distribute of controlled substances) and 841(b)(1)(a) (penalty provisions) – are not sufficiently in issue to warrant reproduction here.

STATEMENT OF THE CASE

On March 23, 1973, ten agents from the Federal Bureau of Narcotics and Dangerous Drugs (now merged into the Drug Enforcement Administration) executed an arrest warrant issued upon an indictment for conspiracy to distribute a controlled substance returned in the Eastern District of New York. In response to an agent's knock, petitioner opened the door of his apartment and was immediately arrested and manacled. Instead of

being removed from the premises, he was taken into the kitchen where he was advised of his rights and then taken to the living room where he was seated in custody of agents for the ensuing six hours. Petitioner submitted quietly to his arrest and at no time were any weapons found on or near petitioner.

Simultaneously with the arrest in the doorway, agents quickly entered and searched each room of the apartment and the basement under it. In the basement an open suitcase containing bags of white powder and a pistol was spotted and seized. Thereafter, two of the agents were dispatched to obtain a search warrant which was executed later that day. Petitioner was kept at the apartment until the agents had completed execution of the search warrant. During this subsequent search, narcotics were seized which, together with those found during the earlier search, were the basis for indictments in the Southern District of New York on May 4, 1973. That Court exercised jurisdiction of the case by authority of 18 U.S.C. §3231 and in compliance with the venue requirements of Fed. R. Crim. P. 18.

At a pretrial hearing on petitioner's motion to suppress the materials seized during the searches of his apartment and the basement, agents referred to the first search as 'securing the apartment' and justified the descent into the basement as a necessary response to sounds emanating from a clock radio or additionally as a security check of the basement.

Following the Trial Court's denial of the motion to suppress, petitioner was tried before a jury and convicted of two counts of possession with intent to distribute of controlled substances. On July 25, 1973, petitioner was sentenced to two concurrent terms of 10 years' imprisonment, and a notice of appeal was filed. The United States Court of Appeals affirmed petitioner's

convictions without opinion on November 26, 1973, and a petition for writ of certiorari was filed in this Court about December 15, 1973.

REASONS FOR GRANTING THE WRIT

Failure to suppress evidence seized during the warrantless search of petitioner's apartment strikes at the difficult balance between a societal interest in guarding individual rights of privacy in the home, and the interest of society in effective, consistent enforcement of its laws. This Court has recently said of warrantless searches of dwellings incident to arrests therein:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person, in order to prevent its concealment or destruction; and the area into which an arrestee might reach in order to grab a weapon or evidentiary items must of course be governed by like rule . . . There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence."

Chimel v. California, 395 U.S. 752, 762-763, 89 S. Ct. 2034, 23 L. Ed.2d 685 (1965).

The Court thus clarified the limits upon searches incident to arrest by narrowing the extent of a search to protect officers or prevent destruction of evidence to circumstances actually likely to result in the harm to be

avoided. In so doing it also established a line between the interests in conflict which is more easily applied by lower courts – the limits of the arrestee's immediate control. Cf., *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed.2d 564 (1971).

The search in petitioner's case greatly exceeds that limit and should be rejected. Ten armed agents of the Bureau of Narcotics and Dangerous Drugs were easily capable of arresting a compliant defendant and removing him from the premises with only a minimally intrusive search of the area surrounding the arrest. Instead, the agents fanned out to search each room of the apartment and the basement below, a search far in excess of reasonable limits upon warrantless searches in these circumstances. The controlled substances seized in this search should have been suppressed, *Chimel v. California*, supra., p. 5, as should those tainted by the illegality of the search which were later seized pursuant to a warrant, *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963). The conviction sustained in conflict with the clear mandate of this Court, based upon evidence seized during the search, should be reversed, *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed.2d 1081, 84 ALR2d 933 (1961).

The decision below conflicts with a clear majority of the decisions in the federal courts below. The relatively few decisions on facts similar to those here reflect recognition of a distinction between justifiable searches and ones which exceed the reasonable needs of the arresting police. Thus on facts most closely resembling those here, courts have consistenly reversed convictions, directly or by writ of habeas corpus based upon evidence obtained during warrantless searches; *United States v. Shye*, 473 F.2d 1061 (6th Cir., 1973), *United States v. Mapp*, 476 F.2d 67 (2d Cir., 1973), *United States v. Jones*, 475 F.2d 723 (5th Cir., 1973), cert. denied ___ U.S. ___, 94 S.Ct. 96, *United States v. Marotta*, 326 F.

Supp. 377 (S. D.N.Y.), affirmed 456 F.2d 1336 (2d Cir., 1971), *United States v. Gardner*, 467 F.2d 205 (7th Cir., 1972), and *United States v. Wysocki*, 457 F.2d 1155 (5th Cir., 1972), cert. denied 409 U.S. 859.

Where searches in circumstances similar to those here have been approved, reviewing courts have cited a distinctly clearer need for protection of officers; *United States v. Titus*, 445 F.2d 577 (2d Cir., 1971), cert. denied 404 U.S. 957 (forcible entry, armed robbery suspect crouched with shotgun aimed at officers), *United States v. Johnson*, 467 F.2d 630 (2d Cir., 1971), cert. denied 410 U.S. 932, 413 U.S. 920 (hot pursuit of several armed robbers), *United States v. Gamble*, 473 F.2d 1274 (7th Cir., 1973) (arrest warrant for robbery, rustling in response to officers' knock followed by forcible entry and discovery of three people in apartment), *United States v. Briddle*, 436 F.2d 4 (8th Cir., 1970), cert. denied 401 U.S. 921 (no response to knock, officer admitted by manager to confront defendant standing at entrances to two rooms in one of which a weapon was seen in plain view). All of these cases are far from the instant situation, where the petitioner submitted to custody peacefully at his front door.

Even decisions preceding *Chimel v. California*, supra., p. 5 – which applies only to searches conducted after June 23, 1969, *Williams v. United States*, 401 U.S. 646, 91 S. Ct. 1148, 28 L. Ed. 2d 388 (1971) – have all clearly distinguished the limits imposed by *Chimel* from the earlier standards under *United States v. Rabinowitz*, 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653 (1950), and *Harris v. United States*, 331 U.S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947). See *United States v. Martinez*, 434 F.2d 190 (9th Cir., 1970), *United States v. De La Cruz*, 422, F.2d 723 (9th Cir., 1970), cert. denied 398 U.S. 942, *United States v. Masiello*, 434 F.2d 33 (2d Cir., 1970), cert. denied 404 U.S. 1060, *United States v.*

Harris, 435 F.2d 74 (D.C. Cir., 1970), cert. denied 402 U.S. 986, *United States v. Goad*, 426 F.2d 86 (10th Cir., 1970), *United States v. Vaca*, 417 F.2d 103 (10th Cir., 1969), cert. denied 404 U.S. 979, and *United States v. Gardner*, supra., p. 7.

In the present case there were no circumstances surrounding the arrest which would justify more than a minimal intrusion into petitioner's home. Once he was arrested and 'secured,' further detention of petitioner in his living room during six hours and two searches served no purpose other than to give a most hollow appearance of a search incident to his arrest. Agents could as well have removed him from the premises before embarking upon the search, a course rejected by this Court in *Vale v. Louisiana*, 399 U.S. 30, 90 S. Ct. 1969, 26 L. Ed. 2d 409 (1970), and *Shipley v. California*, 395 U.S. 818, 89 S. Ct. 2053, 23 L. Ed. 2d 732 (1969). And contrary to the government's assertion, "securing the apartment," in the absence of a real threat to security is not the less a search because agents failed to ransack the apartment and dismantle the dumbwaiter the first time through. If the reason for the percursory search was a hope that narcotics would be found at the home of one arrested on a warrant for narcotics offenses, the proper procedure would have been to obtain a search warrant to be executed at the time of the arrest, *Agnello v. United States*, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145, 51 ALR 409 (1925), and see *United States, v. Goad*, supra.

This Court has said a warrantless search is unreasonable per se, *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), except for a few exceptions, see, *Vale v. Louisiana*, supra., 399 U.S. at 35, and *United States v. Nelson*, 459 F.2d 884,887 (6th Cir., 1972). The validity of the exception is determined by the reasonableness of the exigency claimed in support of the warrantless search, not the reason-

ableness of the search itself, *United States v. United States District Court,* 407 U.S. 297, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972). The search in this case exceeded any reasonable extension of the incident-to-arrest doctrine, and violated petitioner's Fourth Amendment protection against unreasonable searches and seizures. It goes directly against the mandate of this Court and is out of harmony with decisions by other federal Courts of Appeals.

If the writ prayed herein is granted, and the cause set for argument, petitioner will elaborate on the threat to Fourth Amendment protections foreshadowed in his conviction. Security of arresting officers and preservation of evidence are compelling needs justifying exceptions to the requirement of a search warrant, but they must be closely limited to truly exigent circumstances. As this Court has said of warrantless searches of automobiles, *Coolidge v. New Hampshire,* supra., p. 6, 403 U.S. at 461, "the word[s] '[police security]' are not a talisman in whose presence the Fourth Amendment fades away and disappears." To sustain a conviction where ten armed agents claim to be performing a 'security check' incident to the peaceful execution of an arrest warrant for one individual, as here, would suggest there is no longer any limit to searches of houses, so long as the appropriate passwords are mentioned, cf., *Chimel v. California,* supra., p. 5, at 767. The exception of the requirement of of a warrant allowed in the name of security, if it is not to become the rule, must be restricted to use against real possibilities of danger. What this conviction stands for is the carving of a new exception to the warrant requirement of the Fourth Amendment. By permitting a distinction between a 'security check' of a whole house and a search of the whole house – a distinction impossible to police – this Court encourages the erosion

of respect for its mandate in *Chimel*, whose only end point will be a return to the relatively unlimited exception which prevailed before. See *Mahoney v. LaVallee*, 396 F.2d 887 (2d Cir. 1968), cert. denied 395 U.S. 978. Such a new exception, unlike the one this Court recognized in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), would be created only at the cost of an unnecessary intrusion on the privacy the Fourth Amendment is intended to protect. That intrusion should not be allowed to grow beyond the present reasonable limits imposed under *Chimel*.

CONCLUSION

For the reasons set forth therein and in consideration of the circumstances of this case, petitioner prays that this Court grant the petition for writ of certiorari and that the cause be reversed or set down for argument.

Respectfully submitted,

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Attorney for Petitioner

Of Counsel:
Rufus King, III

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of November one thousand nine hundred and seventy-three.

Present: HON. LEONARD P. MOORE
HON. PAUL R. HAYS
HON. WILLIAM H. TIMBERS
Circuit Judges,

No. 73-2171

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SARA BREWINGTON,
Defendant,

WILLIE BREWINGTON,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By /s/VINCENT A. CARLIN
Chief Deputy Clerk

A true copy:
/s/A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1876

WILLIE BREWINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that narcotics seized in plain view in the basement of his apartment following his arrest in the apartment should have been suppressed.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of possession of heroin and cocaine, in violation of 21 U.S.C. 812, 841(a) and 841(b)(1)(A). He was sentenced to two concurrent terms of ten years' imprisonment.

The court of appeals affirmed without opinion (Pet. App.).

The evidence showed that on the morning of March 23, 1973, Special Agent Francis White and five other agents of the Bureau of Narcotics and Dangerous Drugs arrived at petitioner's apartment to execute a warrant for his arrest. Petitioner, dressed in his underwear, was arrested in the doorway of his apartment after he had opened the door in response to the agents' knock. While petitioner was being placed under arrest, White and two other agents ran into the apartment to secure it. A short distance into the apartment, White saw a stairway descending into a basement from which he heard the sound of voices. The agents went to the basement where they found that the voices were coming from a radio. In the basement the agents also observed, on a table next to the wall, an open suitcase which contained a half kilogram of heroin, three-quarters of a kilogram of cocaine, paraphernalia for diluting the drugs and a fully loaded pistol.[1] (A. 30-34, 66-68; Tr. 24-30, 68-69.)[2]

After a "field test" verified that the suitcase contained narcotics, agents were dispatched to obtain a search warrant for the balance of the basement and

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[1] Petitioner had a prior weapons conviction, which was known to the arresting officers (A. 61).

[2] "A." refers to the appendix in the Court of Appeals, which reproduces the transcript of the hearing on petitioner's suppression motion. "Tr." refers to the reporter's transcript of proceedings at trial.

the apartment (A. 34-36; Tr. 30-31, 68-70). A search pursuant to that warrant disclosed a kilogram of heroin in an immobilized dumbwaiter located in the wall at the top of the basement stairs and $18,000 in a bedroom in the apartment (A. 37-39, 43-44; Tr. 34-35, 71-73).

Petitioner's sole contention is that the narcotics found in plain view in the basement and the narcotics seized pursuant to the search warrant, probable cause for which was based in part on the narcotics found in the basement, should have been suppressed. Petitioner's motion to suppress the narcotics was denied by the district court following a pretrial hearing and the court of appeals affirmed that ruling. This contention does not warrant further review.

When the agents entered petitioner's apartment and placed him under arrest, knowing of his weapons conviction, they were entitled to make a cursory examination of the premises to ascertain that no one else was present who might threaten their safety, particularly since petitioner was undressed and could not be removed immediately from the apartment. *United States* v. *Christophe*, 470 F. 2d 865, 869 (C.A. 2), certiorari denied *sub nom. Pierro* v. *United States*, 411 U.S. 964; *United States* v. *Briddle*, 436 F. 2d 4, 7-8 (C.A. 8), certiorari denied, 401 U.S. 921. The agents' right to make a cursory examination of the apartment for other persons included the right to look in a basement from which there was unimpeded access to the apartment, especially since

the sounds coming from the stairwell implied that someone was in the basement.[3]

Having legally entered the basement to perform a cursory security examination, the agents were entitled, indeed obliged, to seize the narcotics, paraphernalia, and pistol, which were in plain view. See *Coolidge* v. *New Hampshire*, 403 U.S. 443; *Harris* v. *United States*, 390 U.S. 234, 236.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

[3] Petitioner's reliance on *Chimel* v. *California*, 395 U.S. 752, is misplaced since the cursory examination conducted here for the agent's protection is not the type of thorough, systematic search condemned in *Chimel*.

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